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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 685

THOMAS EDWARD FURLONG, HARRY SCOTT KNEEVERS, and CHARLES JOSEPH SWARTZ,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

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May 1, 1952 A.D.

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Although Petitioners rely upon the matters set forth in support of the original Petition for Certiorari filed in this cause, they deem it advisable, to aid this Court in its understanding of the matters involved herein, to call attention to certain omissions of fact and misconceptions in Respondent's Brief in Opposition.

ARGUMENT.

I.

Respondent misconstrues the effect of the supplemental instruction in this case.

Respondent asserts that the supplemental charge was fair to the petitioners (Resp. Br. 9). The fallacy of the analysis which Respondent makes of the charge is that it ignores the fact that the test of this type of instruction is a balancing of the pressure on the jury to arrive at a verdict against the counter-pressure on each juror not to surrender his individual beliefs (*Stewart* v. *United States,* 300 Fed. 769, 785-787).

In this case, the only reference to the fact that a juror must see that the verdict is his own and not the result of a mere acquiescence in the views of the majority is contained in the beginning of the instruction, and it is immediately followed by a statement, qualifying in grammatical structure, with respect to the weight to be given to the views of the majority. The addition of the ending directing the jury to continue deliberating until it arrived at a verdict weakens the effect of this language since it is the last thing the juror hears before he returns to the jury room. Thus the general impression which the juror carries away is that it is necessary to arrive at a unanimous verdict, even if it does involve a deference to the views of the majority. Nothing is added to the charge in *Commonwealth* v. *Tuey,* 8 Cush. (Mass) 1 to give additional reinforcement to the duty of the individual juror to retain his honest convictions and express them in the verdict in order to counterbalance the effect of the last sentence of the charge in this case.

In the light of the foregoing, it is interesting to note that the court noted in *Bord* v. *United States,* 133 F. (2d) 313, 315, cited by Respondent, that the instruction closed with an instruction not to surrender their honest convictions and a cordial expression of appreciation to the jury rather than a threat that they would be held in the jury room until they agreed.

In contending that the language in the *Bord* case and in *United States* v. *Olweiss,* 135 F. (2d) 798 goes considerably beyond the language complained of here, (Resp. Br. 10), Respondent ignores the fact that, although those cases contained strong statements with respect to the ability of the jury to agree, they did not contain a threat to keep the jurors locked in the jury room until they did agree.

II.

Respondent misconceives the effect of the proceedings on the afternoon the charge was given and fails to take account of the expression of the trial judge on motion for new trial.

In attempting to show that the language was not considered coercive at the time the charge was given by citing the conduct of petitioners' counsel, Respondent ignores the fact that the jury was permitted to retire before counsel had an opportunity to object. (R. 300). At this point, the damage was done (*Byas* v. *United States,* 182 F. (2d) 94, 98). After a short colloquy, consisting of five lines in the printed record (R. 300) the court adjourned. Where counsel is not afforded the full opportunity to be heard out of the presence of the jury before it retires from the box without having to request it affirmatively, events transpire so quickly that it is an extremely unlikely assumption that counsel fully appre-

ciated the significance to be attached to those words when discussed at length in the jury room in the space of the minute or so before the judge left the bench. Even had counsel done so, it would have been too late under the rule in the *Byas* case.

Moreover, in intimating that had the trial judge been apprised of this contention he would have cleared up any misunderstanding (Resp. Br. 11), Respondent ignores the comments of the trial judge himself, on motion for new trial, where Judge Campbell says concerning this point (R. 337)

> "* * * and I had the charge in the *Allen* case in writing. We have it in the envelope in all cases anyway, and opportunity was given, as I recall, to object.
> Mr. McAdams: I objected, yes.
> The Court: You were given an opportunity to object to it, and your objection was overruled and the charge was then given to the jury,"

The judge then denied the motion for a new trial, made on this ground, and held the charge was non prejudicial.

CONCLUSION.

For the above and foregoing reasons, in addition to those submitted in support of the Petition for Certiorari herein, said petition should be granted.

Respectfully submitted,

FRANK J. MCADAMS, JR.,
Counsel for Petitioners.

May 1, 1952 A.D.

SUPREME COURT OF THE UNITED STATES

No. 707.—October Term, 1951.

W. L. Gelling, Appellant, v. State of Texas.	On Appeal From the Court of Criminal Appeals of the State of Texas.

[June 9, 1952.]

Mr. Justice Douglas, concurring.

The appellant was convicted under an ordinance of the city of Marshall, Texas, for exhibiting a picture after being denied permission to do so by the local Board of Censors. The conviction was affirmed by the Court of Criminal Appeals of Texas. The ordinance authorizes a local Board of Censors to deny permission for the showing of a motion picture, which in the opinion of the Board is "of such character as to be prejudicial to the best interests of the people of said City," and it makes the showing of a picture after refusal of permission a misdemeanor.

The evil of prior restraint, condemned by *Near* v. *Minnesota*, 283 U. S. 697, in the case of newspapers and by *Burstyn* v. *Wilson*, 343 U. S. ——, in the case of motion pictures, is present here in flagrant form. If a board of censors can tell the American people what it is in their best interests to see or to read or to hear (cf. *Public Utilities Comm'n* v. *Pollak*, 343 U. S. ——), then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated.